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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 HERBERT JOHNSON,  
12 CDCR #P-60805,

13 Plaintiff,

14  
15 vs.  
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18 K. MILLARD; N. SABATI; CAMPBELL;  
19 A. LOWE; S. WAGER; J. RIVERA;  
20 COBB,

21 Defendants.  
22  
23

Civil No. 11-1691 JAH (NLS)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE AND GARNISHING  
\$350.00 BALANCE FROM  
PRISONER TRUST ACCOUNT  
[ECF No. 2];**

**(2) DISMISSING DEFENDANTS  
FOR FAILING TO STATE A CLAIM  
PURSUANT TO 28 U.S.C.  
§ 1915(e)(2)(B) & 1915A(b); AND**

**(3) DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE OF COMPLAINT  
PURSUANT TO FED.R.CIV.P. 4(c)(3)  
& 28 U.S.C. § 1915(d)**

24  
25 Plaintiff, a state inmate currently incarcerated at the Richard J. Donovan Correctional  
26 Facility located in San Diego, California, and proceeding pro se, has filed a civil rights  
27 Complaint pursuant to 42 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In*  
28 *Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF No. 2].

1 **I. MOTION TO PROCEED IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United  
 3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
 4 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee  
 5 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*  
 6 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP  
 7 remains obligated to pay the entire fee in installments, regardless of whether his action is  
 8 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2).

9 The Court finds that Plaintiff has submitted a certified copy of his trust account statement  
 10 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account  
 11 statement shows he has insufficient funds with which to pay any initial partial filing fee. *See* 28  
 12 U.S.C. § 1915(b)(4). Therefore, the Court GRANTS Plaintiff's Motion to Proceed IFP [ECF  
 13 No. 2], and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire  
 14 \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the  
 15 Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

16 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

17 The PLRA's amendments to 28 U.S.C. § 1915 also obligate the Court to review  
 18 complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are "incarcerated  
 19 or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for,  
 20 violations of criminal law or the terms or conditions of parole, probation, pretrial release, or  
 21 diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2)(B)  
 22 and 1915A(b). Under these provisions, the Court must sua sponte dismiss any prisoner civil  
 23 action and all other IFP complaints, or any portions thereof, which are frivolous, malicious, fail  
 24 to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.  
 25 §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
 26 (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir. 2000) (§ 1915A).

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1           **A.       42 U.S.C. § 1983**

2           To state a claim under § 1983, Plaintiff must allege that: (1) the conduct he complains  
3 of was committed by a person acting under color of state law; and (2) that conduct violated a  
4 right secured by the Constitution and laws of the United States. *Humphries v. County of Los*  
5 *Angeles*, 554 F.3d 1170, 1184 (9th Cir. 2009) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

6           **B.       Eleventh Amendment**

7           First, to the extent Plaintiff asserts claims against the “Medical and Mailroom”  
8 Departments of the Richard J. Donovan Correctional Facility, the Court finds the claims against  
9 these Defendants must be dismissed for failing to state a claim and for seeking damages against  
10 defendants who are immune pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) & (iii). The State of  
11 California, the California Department of Corrections and Rehabilitation, an agency of the State  
12 of California, and Departments within the Richard J. Donovan Correctional Facility, are not  
13 “persons” subject to suit under § 1983 and are instead, entitled to absolute immunity from  
14 monetary damages actions under the Eleventh Amendment. *See Seminole Tribe of Florida v.*  
15 *Florida*, 517 U.S. 44, 53-54 (1996); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S.  
16 89, 106 (1984); *see also Hale v. State of Arizona*, 993 F.2d 1387, 1398-99 (9th Cir. 1993)  
17 (holding that a state department of corrections is not a “person” within the meaning of § 1983).  
18 Therefore, Plaintiff’s claims against the “Medical and Mailroom” are hereby dismissed pursuant  
19 to 28 U.S.C. § 1915(e)(2)(B)(ii) & (iii) without leave to amend.

20           **C.       Eighth Amendment claims**

21           As to Plaintiff’s Eighth Amendment claims, the Court finds that Plaintiff’s claims are  
22 sufficiently pleaded to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and  
23 1915A(b). Therefore, Plaintiff is entitled to U.S. Marshal service on his behalf. *See Lopez*, 203  
24 F.3d at 1126-27; 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all  
25 process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may order  
26 that service be made by a United States marshal or deputy marshal ... if the plaintiff is authorized  
27 to proceed *in forma pauperis* under 28 U.S.C. § 1915.”).

28       ///

1 Plaintiff is cautioned, however, that “the sua sponte screening and dismissal procedure  
2 is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant]  
3 may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

4 **III. CONCLUSION AND ORDER**

5 Good cause appearing, **IT IS HEREBY ORDERED** that:

6 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is  
7 **GRANTED**.

8 2. The Secretary of California Department of Corrections and Rehabilitation, or his  
9 designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee  
10 owed in this case by collecting monthly payments from the account in an amount equal to twenty  
11 percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court  
12 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).  
13 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
14 **ASSIGNED TO THIS ACTION**.

15 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,  
16 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,  
17 Sacramento, California 95814.

18 **IT IS FURTHER ORDERED** that:

19 4. Defendant “Medical and Mailroom” is **DISMISSED** from this action pursuant to  
20 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). The Clerk of Court shall terminate this Defendant  
21 from the docket.

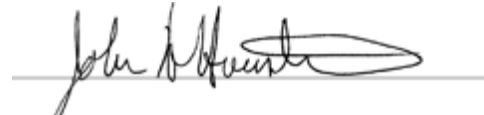
22 5. The Clerk shall issue a summons as to Plaintiff’s Complaint [ECF No. 1] upon the  
23 remaining Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form  
24 285 for each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of  
25 this Order and a certified copy of his Complaint and the summons for purposes of serving the  
26 Defendants. Upon receipt of this “IFP Package,” Plaintiff is directed to complete the Form 285  
27 as completely and accurately as possible, and to return it to the United States Marshal according  
28 to the instructions provided by the Clerk in the letter accompanying his IFP package.

1        Thereafter, the U.S. Marshal shall serve a copy of the Complaint and summons upon the  
2 Defendants as directed by Plaintiff on the USM Form 285. All costs of service shall be  
3 advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

4        6. Plaintiff shall serve upon the Defendants or, if appearance has been entered by  
5 counsel, upon Defendants' counsel, a copy of every further pleading or other document  
6 submitted for consideration of the Court. Plaintiff shall include with the original paper to be  
7 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy  
8 of any document was served on the Defendants, or counsel for Defendants, and the date of  
9 service. Any paper received by the Court which has not been filed with the Clerk or which fails  
10 to include a Certificate of Service will be disregarded.

11        **IT IS SO ORDERED.**

12        DATED: October 7, 2011

A handwritten signature in black ink, appearing to read "John A. Houston", is written over a horizontal line.

14        JOHN A. HOUSTON  
15        United States District Judge